

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





77-1019

To be Argued by  
JURIS G. CEDERBAUMS  
(15 Minutes)

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
DOCKET NO. 77 - 1019

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UNITED STATES OF AMERICA  
Appellee

-v-

DOMINIQUE ORSINI  
Appellant.

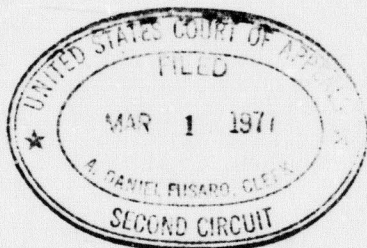
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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT DOMINIQUE ORSINI

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### QUESTIONS PRESENTED

1. Whether it was error for the Court to grant the motion to quash a subpoena duces tecum issued appellant to Mr. Anthony Marro, a reporter for Newsweek magazine in connection with the jurisdictional hearing.
2. Whether appellant had proved that his presence in the jurisdiction was secured by the Government by the use of deliberate, unnecessary, and unreasonable conduct amounting to a patent violation of due process principle.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,  
Appellee,

- v -

DOMINIQUE ORSINI,  
Appellant.

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APPELLANT'S BRIEF

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PPELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Bramwell, J.) entered on December 17, 1976 sentencing appellant to a term of imprisonment of ten years upon his plea of guilty of conspiracy to violate the narcotics laws (21 U.S.C. §§ 173 and 174), and denying, inter alia, appellant's claim that the indictment against him should be dismissed because the Government had obtained jurisdiction over him by use of deliberate, unnecessary and unreasonable conduct amounting to a patent violation of due process principles, and a subpoena duces tecum issued pursuant to the hearing



on the jurisdictional claim.

Appellant is presently incarcerated pursuant to the judgment.

### STATEMENT OF FACTS

#### INTRODUCTION:

In 1974, the appellant, DOMINIQUE ORSINI, was indicted for a conspiracy to import and distribute narcotics into the United States by a grand jury sitting in the Eastern District of New York.

On August 6, 1975, pursuant to a request from the United States Government, Orsini was arrested in Dakar, Senegal. On August 25, 1975, Orsini was forcibly brought to the United States to face trial on the charges.

On October 24, 1975, the District Court (Bramwell, J.) entered an order directing an evidentiary hearing to determine the validity of defendant's allegations pursuant to United States v. Toscanino, 500 F.2d 267 (2d Cir., 1974) and its progeny; see United States v. Dominique Orsini, et al., 402 F. Supp. 1218 (EDNY, 1975).

On August 30, 1976, Orsini issued a subpoena duces tecum to Anthony Marro, a reporter for Newsweek magazine, seeking the sources of several statements quoted in the August 16, 1976 Newsweek article co-authored by Marro.

On September 20, 1976, the Court (Bramwell, J.) granted Marro's motion to quash.

By an order dated September 28, 1976, the Court (Bramwell, J.) denied defendant's motion to dismiss on jurisdictional grounds and on the same day appellant pleaded guilty. On December 17, 1976 he was sentenced to 10 years imprisonment.

THE TESTIMONY AT THE TOSCANINO  
HEARING

In July, 1975, the resident Drug Enforcement Administration (hereafter DEA) Agent in Argentina, one RHYN TRYAL, learned that Mr. Orsini was to fly from Buenos Aires to France via Dakar, Senegal on July 31\* he advised the Washington DEA office of this fact on July 30 and the following day they had the Washington Interpol Office send a telegram to Dakar requesting Mr. Orsini's provisional arrest "for purposes of extradition through diplomatic channels; "Louis Fields of the United States State Department sent

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\*

The Court sustained objections to questions as to whether Tryal had obtained this information via illegal wiretaps of Mr. Orsini in Argentina (Minutes of 11/21/75 at 129-130 (Colloquy) 143-144 (Tryal), 177-178 [Colloquy]) (References in parentheses will be to the minutes of the hearing by date and page followed, if pertinent, by the name of the witness).



a similiar cable to Allen Davis, the charge d'affaires of the American Embassy in Dakar (Mins. 11/20/75 at 66-80 (Fields); Mins. 11/21/75 at 134-135, 150-151 (Tryal; Mins. 1/15/76 at 32, 56-63 (Bocchicchio); Mins. 7/26/76 at 6-7, 30-31 (Davis); Deft. Ex. B (Interpol Telegram of 7/31/75. For some reason Mr. Orsini did not take the flight on July 30 (Mins. 11/20/75 at 78[Fields])).

On August 6, 1975, Mr. Orsini left Buenos Aires for France via Dakar, Senegal; Tryal had informed DEA of the fact that Mr. Orsini was on this plane and then he boarded the plane also; Interpol was advised of this and cabled Dakar, again requesting Mr. Orsini's arrest for extradition; the State Department also informed the American Embassy of Mr. Orsini's anticipated arrival (Mins. 11/20/75 at 71 (Fields); Mins. 11/21/75 at 135-136 (Tryal); Mins. 7/26/75 at 6-7 (Davis); Def't. Exh. C (Interpol Telegram of 8/7/75)).

When the plane carrying Mr. Orsini and Tryal landed at Dakar, Charge' Davis and some Senegalese police were waiting; Tryal pointed out Mr. Orsini, Charge' Davis requested the police to arrest Mr. Orsini and this was done; shortly thereafter Mr. Orsini was removed from the airport (Mins. 11/21/75 at 136-137 (Tryal); Mins. 7/26/76 at 7-9 [Davis])).

The following day Interpol Dakar sent a telegram to Interpol Washington and Interpol Paris (Mr. Orsini being a French citizen) stating that Mr. Orsini

had been arrested and that

"Extradition creates no problem. Urgently transmit through diplomatic channels documents concerning the extradition" (Def't. Exh. D [Interpol Telegram of 8/8/75]).

Despite the assurance that "extradition creates no problem," there were considerable problems in that regard.

In July 1975 the American Embassy in Senegal had advised the State Department (which advised DEA) that there was no extradition treaty between the United States and Senegal (Mins. 1/15/76 at 60-61 (Bocchichio); Mins. 7/26/76 at 36-37 [Davis]).

It was for this reason that in response to Interpol Dakar's telegram referred to above Interpol Washington replied:

"Necessary documentation concerning the extradition request is ready to be sent by diplomatic channels... Should your government, in accordance with the attributes of your sovereignty, decide to expel Orsini instead of extraditing him, please examine the possibility of envisaging his return to the United States" (Def't. Exh. E [English translation of French translation of Interpol Washington telegram of 8/8/76]).\*

\* On August 8, 1975 Interpol Washington sent Interpol Dakar a telegram apparently partly in code (Def't. Exh. E [Interpol Washington telegram to Interpol Dakar of 8/8/76]). It was this telegram which was translated into French for submission to the Senegalese Court and which, translated back into English for submission to this Court is Def't Exh. E. In its original form, with the probable meaning following the code words, it reads, in pertinent part:

"If your government, pursuant to your own Sovereign pre-rogative, decide to expell Orsini rather than to bursa [extradite], please advise as to schedule for return to fokul [United States]."

It must be remembered that all of Interpol Washington's information and suggestions came from DEA (Mins. 1/15/76 at 62-63 [Bocchichio]).



The switch from extradition to expulsion was suggested by DEA which, as noted had been made aware of the absence of any extradition treaty (Mins. 1/15/76 at 60-61 [Bocchichio]).\*

Mr. Orsini's family retained counsel in Senegal and he commenced a proceeding challenging the arrest and extradition attempt (Mins. 9/20/76 at 81 (Orsini), Def't. Exh. A [Decision of Senegalese Court of Appeals of 8/23/75]).

On Thursday, August 21 Charge' Davis was informed that the Senegalese government wanted all the documentation that pertained to Mr. Orsini's attempted extradition; Davis called the State Department and said the request was so urgent that it should be brought personally, by someone with legal experience, and that someone who could take custody of Mr. Orsini should accompany him; Louis Fields of the State Department and DEA agent Anthony Bocchichio were dispatched to Dakar (Mins. 7/26/76 at 11 [Davis]).

At the same time this was happening, DEA in Washington called DEA in Paris and told them to prepare a French-speaking agent to fly to Dakar to bring Mr. Orsini back to the United States the following Monday, August 25; his ticket was purchased on Friday, August 22 (Mins. 11/21/75 at 181-182, 212-217 [Collier]).

\* DEA agent Bocchichio subsequently testified that he had been "advised" that despite the absence of an extradition treaty extradition was still possible (Id at 64). He never explained this anomaly.

Fields and Bocchichio arrived in Dakar on Friday, August 22, met with Charge' Davis and they all went to the office of Mr. Wane Barane, the technical consul of the Senegalese Ministry of Foreign Affairs; they were told that it was urgent that they go to the Ministry of Justice, where they met a Mr. Moustar Mbacke and delivered to him the extradition documents Fields had brought;\* Davis again requested that Mr. Orsini be turned over to them but Mbacke said he would contact them after the Senegalese court made its decision on the morning of Saturday, August 23; Mr. Mbacke said he would try to deliver the extradition papers to the court before a decision was rendered (Mins. 11/20/75 at 29-37, 84-87, 97-107 (Fields); Mins. 11/21/75 at 232-235 (Bocchichio); Mins. 7/26/76 at 11-13 [Davis]).

On August 23 the Chambre d'Accusation, a division of the Senegalese Court of Appeals, declared Mr. Orsini's arrest illegal because the Interpol telegrams did not contain sufficient information to satisfy Senegalese law; the Court also noted receipt of the American extradition papers and held that they "reinforce[d] the reasons hereinabove set forth," i.e., that since there was no showing that Mr. Orsini ever committed any act in the demanding country, extradition would be denied; the Court therefore "Order[ed] that he be

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Also present at this meeting was one Sadibou Ndiaye, director of the Judiciary Police and the Senegalese Interpol representative (Mins. 11/20/75 at 31 [Fields]).



set free" and his belongings returned to him (Def't. Exh. A [Decision of Court of Appeals of 8/23/75]).

At mid-morning of August 23 Mr. Sadibou Ndiaye (See previous footnote), called Charge' Davis and asked if Davis could take immediate custody of Mr. Orsini until Monday morning (the next flight to the United States) and Ndiaye said he would call back; Ndiaye called back at 1:00 p.m. and said he would deliver Mr. Orsini to the airport Monday morning (Mins. 7/26/76 at 14-15 [Davis]). Davis testified that he never asked Ndiaye what decision the Court had rendered and Ndiaye did not tell him; he said he only found out that Mr. Orsini had been ordered released when he later read it in a French-language newspaper ( Mins. 7/26/76 at 59-60, 71-72 [Davis]).

Louis Fields testified that he was advised by Davis that Mr. Orsini would be delivered to the airport Monday morning; he was also advised that Mr. Orsini's arrest had been declared illegal because of a violation of the International Compact on Civic Aviation and he had been "ordered released from the custody of the Senegalese Police authorities by the Dakar Court [and that] he was released approximately noon on the 23rd".(Mins. 11/20/75 at 40, 84, 88-90 [Fields]). No American had any contact with the Senegalese between Ndiaye's second telephone call and the arrival at the airport on Mon-

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It is not clear whether this call was before or after the Senegalese Court rendered its decision.

day morning (Mins. 11/20/75 at 40, 42 (Fields); Mins. 7/26/76 at 15-16 [Davis]), Fields could only have learned of the release from Davis.

Although Davis said there was "no suggestion" prior to Ndiaye's phone calls of August 23 that Mr. Orsini could be taken back to the United States on Monday, August 25 (Mins. 7/26/76 at 55 [Davis]), DEA agent Collier testified that he had been told on Thursday, August 20 that he would be bringing Mr. Orsini back on August 25 (Mins. 11/21/75 at 213-214 [Collier]). This may be explained by the fact that on August 21 Davis had been advised that Mr. Orsini would be taken to this country regardless of whether extradition was granted.

The American Embassy attempted to conceal the fact that it was going to remove Mr. Orsini on Monday by first making the plane reservations in a "no name" category and then purchasing a ticket for Mr. Orsini as "John or James Smith" (Mins. 7/26/76 at 70 [Davis]).

Although the decision of August 23 specifically directed that Mr. Orsini be released, when he was returned to the jail to receive his belongings he was kidnapped by Senegalese police aided by two Americans; he was beaten and handcuffed and taken to Central Police Headquarters where he was held incommunicado (Mins. 9/20/76 at 83-85 (Orsini)).



On the morning of August 25 the Senegalese police and the Americans came to Orsini's cell and told him he was being taken to America. When he refused they beat him and threw him against a glass partition which shattered and cut his hand. He was taken out of that building and put into a police truck. He was taken to a hospital and received six stitches in his hand. The Americans accompanying him refused to permit the doctor to give him a transfusion (Mins. 9/20/76 at 85-87 (Orsini); Mins. 11/20/75 at 63-65 [colloquy]).

One Marie Appoline Serge observed Mr. Orsini being beaten by the Senegalese. He was opposite the Central Police station when Mr. Orsini was taken out and put in the police truck; he saw the Senegalese police beat Mr. Orsini and he saw an American car with diplomatic license plates nearby; one of the occupants of the car spoke to the Senegalese in French and told the police to keep Mr. Orsini quiet and take him to the airport (Deposition of 8/25/76 at 5-15 [Serge]), (Def't. Exh. F.).

During the trip to the airport the Senegalese continued to beat Mr. Orsini; he by-passed the immigration authorities and was taken right to a plane; when the back door of the truck was opened he was thrown out and dragged to the waiting Americans;\* they placed him under arrest and while forcing him

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Charge' Davis testified that Mr. Orsini's clothes were disheveled and blood-stained (Mins. 7/26/76 at 68 [Davis]). Fields testified to the bandage of Mr. Orsini's wrist (Mins. 11/20/75 at 59).

onto the plane one of them struck him in the back of the head; he resisted so strenuously that the pilot refused to take off; a doctor attached to the Embassy was called and, over Mr. Orsini's protests, he administered a tranquilizer to Mr. Orsini and the plane took off and flew to this country; Sadibou Ndiaye was present at the airport during all of these proceedings (Mins. 11/20/75 at 43-53 (Fields); Mins. 7/26/76 at 18-23 (Davis); Mins. 9/20/76 at 87-89 [Orsini]).\*

Mr. Orsini also testified to a constant American presence during all of these proceedings. DEA agent Bocchichio was in the courtroom when the senegalese court ordered Mr. Orsini freed, an American car followed him after the Senegalese kidnapped him; he heard English coming from the cab of the truck in which he was taken to the airport; the doctor who wanted to give him a blood transfusion declined on the ground that "The Americans are managing this affair and the Americans gave all the orders at the airport (Mins. 9/20/76 at 82, 84, 86-88 [Orsini]).

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Contrary to Fields and Davis, Mr. Orsini testified that the doctor who injected him was already on the plane when he arrived (Id at 103).



POINT I

IT WAS ERROR FOR THE COURT  
TO GRANT THE MOTION TO QUASH  
A SUBPOENA DUCES TECUM ISSUED  
TO ANTHONY MARRO OF NEWSWEEK  
MAGAZINE, SINCE THE INFORMATION  
HE POSSESSED WAS MATERIAL AND  
NECESSARY TO THE HEARING.

On August 16, 1976, an article appeared in Newsweek magazine, co-authored by Anthony Marro, which discussed the means used by the DEA to secure the presence of their targets in the United States. Although the article did not discuss Orsini's case per se, Orsini's photograph was actually printed in the article as one of the victims of these DEA activities which, the article concluded, were of dubious morality and legality. It then made specific quotes the sources of which were the subject of the subpoena duces tecum issued by appellant. In his opposing affidavit dated September 14, 1976, Mr. Marro admitted that his sources were persons he interviewed in New York and Washington, D.C. Marro further stated that the sources of the information were "federal officials who feared that their careers would be gravely injured if it were discovered that they were providing to a reporter information that could be viewed as adverse to the Government." He further stated that "informants who work for the federal Government are extremely reluctant to provide me

with criticism of official policy or with information revealing deficiencies in official policy unless I promise not to disclose their identities. "It had further been Marro's experience that information from such sources is often the most important which can be obtained about drug enforcement, and cannot be verified elsewhere.

A. THE INFORMATION SOUGHT  
BY THE SUBPOENA IS BOTH  
MATERIAL AND RELEVANT TO  
THE CURRENT EVIDENTIARY  
HEARING.

In brief, defendant Orsini is seeking by this subpoena to obtain information leading to testimony that the American government has a general policy of "reaching" foreign governments to induce them to turn over foreigners wanted on drug charges and/or that this took place in Senegal in Mr. Orsini's case.

What we have not been able to establish by direct evidence, although the facts admit of no other conclusion, is that the American government was responsible for Mr. Orsini's kidnapping, being held incommunicado and being beaten (and his wrist cut) out of the sight of any witnesses. This is what we need Mr. Marro's sources for.



B. NEW YORK LAW (CIVIL RIGHTS  
LAW § 79-L AND CONSTITUTION,  
ARTICLE 1, § 8) DOES NOT APPLY  
TO, NOR BAR THE INFORMATION  
SOUGHT IN THIS CASE.

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The movant cites Baker v. F & F Investment, 470 F.2d 778 (2d Cir., 1972), cert. den. 411 U.S. 966 (1973) as authority for the proposition that the law of New York State is determinative of the issue of the "federal common law applicable to subpoenas to newsmen" (Meno. In Support of Motion of Anthony Marro to quash Subpoena at 7).

Both this citation and the conclusion drawn therefrom are inapposite to the instant matter.

Preliminarily, it is not clear that even if some state law should be referred to, that it is the law of New York. Mr. Marro's affidavit does not state that the federal officials whose identify is sought were interviewed in New York; he only asserts, rather vaguely, that "The information sought by the subpoena relates in part to the phase of my newsgathering that was carried out in New York." (Affidavit of Anthony Marro at 3). On information and belief, an associate of mine, Joel A. Brenner, Esq., was told by Peter Axthelm, the co-author of this story, that Marro's sources were interviewed in Washington, D.C. \* (See Affidavit of Joel A. Brenner in Opposition to

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Mr. Axthelm also told Mr. Brenner that Mr. Marro had told him who the sources were, contrary to Marro's statement that he "never revealed the identity of the sources referred to in the attached subpoena to anyone within the Newsweek organization." (Affidavit of Anthony Marro at 4).

Motion to Quash at 1). If nothing related to the information sought in the subpoena occurred in New York then the fortuitous circumstance that this criminal case happens to be in New York should not permit the movant to invoke New York Law.

It is true that in the Baker case the Court referred to New York law although the information sought had been gathered in Illinois, but that was only because the law of Illinois "enunciate[d] substantially the same public policy" as that of New York. Baker v. F & F Investment, 339 F. Supp 942 (S.D.N.Y.), Aff'd, 470 F.2d 778 (2d Cir., 1972). In this case, by contrast, the District of Columbia has no statutory "shield law" and since the operative acts occurred in the District of Columbia that jurisdiction's law should govern. See Cervantes v. Time, Inc. 464 F.2d 986 (6th Cir., 1972); Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964). Since the District of Columbia would apply federal law to the issue of a newsman's privilege (Carey v. Hume, 492 F.2d 631, 636 n. 8 [D.C. Cir., 1974]), we are back where we started.\*

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\* Baker also looked to State law because there was no federal law providing instruction on the issue of the newsman's privilege. 470 F.2d at 781. While that may have been true in the civil field, this is not true in the criminal law where the Sixth Amendment right to fair trial, and the cases decided thereunder, provide clear instructions on this issue. That state law does not apply in a federal criminal case is illustrated by the fact that in Branzburg v. Hayes, infra, 408 U.S. at 689, the Court made only a passing reference to state shield laws and no federal criminal case since Branzburg has ever mentioned these laws. See, e.g. United States v. Liddy, infra.



The foregoing illustrates the problems which arise when a federal court looks to state law. However, it is respectfully contended that no state law need be referred to in order to resolve this motion.

If there was no federal law on the issue of newsman's privilege before Branzburg v. Hayes, 408 U.S. 665 (1972), there certainly is now.\* And the most recent cases have held, without reference to any state law, that the federal law requires disclosure of confidential sources in a criminal case where a true need therefore is shown. See e.g., Farr v. Pritchess, 522 F. 2d 464 (9th Cir., 1975); Lewis v. United States, 517 F. 2d 236 (9th Cir., 1975); United States v. Liddy, 354 F. Supp. 208 (D.C.D.C. 1972).\*\*

In sum, the law of New York is wholly inapplicable to this criminal proceeding and federal law requires disclosure.

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\* The Second Circuit's decision in Baker, coming less than 6 months after Branzburg, did not have any substantial precedent to look to.

\*\* "First Amendment values will weigh differently in civil and criminal actions." Id at 213 and n. 14.

If we can establish, through these sources and/or others we learn of from these sources, that the American government has a general policy of making bribes, or threats or giving some benefit or applying some pressure to force foreign governments to turn over suspected drug dealers and/or that this happened in Senegal we will have the direct proof we now lack.

Such proof would (a) make the Senegalese agents of the American government so that this government would be directly chargeable for the brutalities the Senegalese inflicted upon Mr. Orsini, and (b) would render the absence of a protest, required by current case law, irrelevant, since a country that was a paid party to the illegalities could hardly be expected to protest to its payor.

Mr. Marro's statement that he did not discuss the Orsini case with his sources does not end this matter. Firstly, they may have been aware of the case but either he or they merely did not mention it. Secondly, even if they did not know of Orsini's case in particular, if they know of other cases and/or a general policy of doing what was done to Orsini, this testimony would be of great importance. Lastly, if they know of the Orsini abduction, or of those who know of it, additional sources might well be located.\*

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It should be pointed out that we attempted to serve subpoenas on the relevant Government agencies to learn this information, but these were blocked by the Court.



C. THE INFORMATION SOUGHT  
IS NOT PRIVILEGED UNDER THE  
FIRST AMENDMENT TO THE CON-  
STITUTION OF THE UNITED STATES

In Branzburg v. Hayes, 408 U.S. 665 (1972) the Supreme Court re-affirmed that the First Amendment is not absolute and that there is only a conditional privilege to newsmen to refuse to divulge their confidential sources. Where it is shown that the information sought is relevant and material to the proceeding and that a compelling need therefore and interest therein exists, the privilege must yield. Id\*

As demonstrated in Point I, the information sought is both relevant and material. The compelling need and interest in this case is no less than Dominique Orsini's Sixth Amendment Constitutional right to a fair trial.\*\*

A California court recently referred to:

"[T]he preeminent importance of the fair trial guarantee to criminal defendants...which is certainly entitled to equal, if not greater

\* Although the facts in Branzburg related to subpoenas issued by grand juries, there can be no doubt that the Branzburg reasoning and holding applies to a subpoena issued by a defendant in a criminal case. Firstly, at numerous places in the decision the Court spoke of requiring members of the press to testify "before grand juries or at criminal trials." Id at 686, 691 (twice), 698, 707. Secondly, numerous decisions have rejected the argument that Branzburg was limited to the grand jury situation and applied it to criminal trials. Farr v. Pritchess, 522 F. 2d 464, 467 (9th Cir., 1975); United States v. Liddy, 354 F. Supp. 208, 213 (D.C.D.C.) on appl. for stay 478 F.2d 586, 587 (D.C. Cir., 1972) (per Leventhal, J.); Rosato v. Super. Ct. 51 Cal. App. 3d 190, 213 (Ct. of App., 1975).

\*\* This is another basis for distinguishing the Baker case.

protection than criminal investigations by grand juries..."

Rosato v. Super. Ct., supra 3 Cal. App. 3d at 213.

The Court concluded:

"[T]he right to a fair trial outweighed the conditional First Amendment right to refuse to disclose sources." Id at 215\*

In their Memorandum in Support of the Motion to Quash (at p. 14), movants erroneously contend that Branzburg only held that there was no privilege relating to "possibly criminal conduct which the newsman himself had observed." Although the Court did refer to the confidentiality of sources involved in, or observed in, criminal conduct (408 U.S. at 691) the Court specifically applied its holding to "those situations where a source is not engaged in [and, therefore, cannot be observed in] criminal conduct, but has information suggesting illegal conduct by others." Id at 693.

\* In Nebraska Press Ass'n. v. Stuary, \_\_\_\_\_ U.S. \_\_\_\_\_, 96 S. Ct. 2791, 2803-4 (1976) the Supreme Court refused to hold that the First Amendment was superior to the Sixth:

"The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined."



If some agent or agency of the American government induced some agent or agency of the Senegalese government to violate the Senegalese Court's order freeing Mr. Orsini and to kidnap Mr. Orsini to turn him over to the DEA, then plainly criminal activity occurred on the part of any American who did this. If Mr. Marro's sources were a part of this conspiracy then their "preference for anonymity... is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." Id at 691. If, on the other hand, the sources merely have knowledge of illegal activity then, unless they are guilty of misprision of felony (18 USC §4) they can only "fear that disclosure or embarrassment." Id at 693. And, if they only had information that would embarrass our government, while not being criminal in nature, they have even less right to be protected.\*

As for the newsman's right to protect his sources for fear they will dry up, as argued in the affidavit of Richard Cooper (and the lengthy exhibits attached thereto), it need only be pointed out that this specific contention was made to, and rejected by, the Supreme Court in Branzburg. Id at 693-95.

Stripped of excessive verbiage, the movant is asking for a declaration that he has an absolute privilege to refuse to name his sources, i.e. he is

\* Mr. Marro's affidavit states that his sources are "federal officials who feared that their careers would be gravely injured if it were discovered that they were providing ... information that could be viewed as adverse to the Government."

• seeking, in effect, what the Supreme Court in Branzburg said he does not  
• have:

"[T]he Supreme Court has said that the right to gather news does not give [a newsman] a First Amendment privilege to resist a demand by proper authority that he divulge a source's identity."  
United States v. Liddy, supra 354 F. Supp. at 214.

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POINT II

APPELLANT PROVED THAT THE GOVERNMENT  
SECURED HIS PRESENCE IN THE JURISDICTION  
THROUGH THE USE OF DELIBERATE, UNNECESSARY  
AND UNREASONABLE CONDUCT AMOUNTING TO A  
PATENT VIOLATION OF DUE PROCESS PRINCIPLES.

The Toscanino trilogy (United States v. Toscanino, 500 F.2d 267, reh. denied 504 F.2d 1308 (2d Cir., 1974); United States ex rel Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975); United States v. Lira, 515 F.2d 68 (2d Cir., 1975)), can be said to basically require four things to be proven in order for the granting of a motion to dismiss an indictment: (1) an illegal abduction of the defendant from a foreign country into the United States; (2) conduct accompanying the abduction which "shocks the conscience", i.e. "torture, terror, or custodial interrogation"; (3) instigation or participation in the abduction or surrounding conduct by United States agents; and (4) a protest from the country of abduction.

It is respectfully submitted that these matters have been established even if the evidence at the hearing is viewed in a light most favorable to the Government.

It is clear that Orsini was taken into custody and arrested on August 6, 1975 in Dakar, Senegal, at the specific request of the American Charge D'Affaires in Senegal, Allan Davis, after he was identified by DEA agent Tryal, who accompanied Orsini on the trip from Buenos Aires to Senegal.

Shortly thereafter, on August 22, 1975, State Department Legal Advisor Louis Fields and DEA Agent Bocchichio arrived from the United States with extradition documents and met with Charge Davis and members of Senegalese Ministry of the Interior and the Ministry of Justice.

On August 23, 1975 a representative of the Senegalese Government, Sadibou Ndiaye, the head of the Federal Judicial Police\*, indicated to Charge Davis that Orsini would be handed over to American agents at the Dakar airport on August 25, 1975.

That same day, of course, the Court of Appeals of Senegal ordered Mr. Orsini released. Yet, shortly thereafter, the Senegalese Judicial Police under the command of the same Ndiaye, rearrested him in direct violation of the order of the Senegalese Court. Ndiaye was present at Orsini's original arrest at the Dakar airport, at his kidnapping after the Court order freeing him, at his subsequent beatings, and at the airport when Orsini was turned over to the American DEA agents.

Clearly, this action was taken at the specific request and direction of the United States Officials. The Senegalese Government had no interest in Orsini other than to accommodate the wishes of the American Charge D'Affaires and the State Department Legal Advisor.

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\*It must be remembered that these Senegalese police were under the command of Ndiaye, that Ndiaye was the Senegalese Interpol representative, and that Interpol had been acting for the DEA through these proceedings.



It is submitted that the corruption of the internal processes of the Senegalese Government, by obtaining a prisoner held in direct disregard of an order of the Senegalese Court of Appeals freeing him in and of itself represents actions which "shock the conscience". Of course, Orsini also received physical abuse and illegal detention, which cannot be disregarded by holding that he obtained them because of his resistance to the acts of the Senegalese. Surely a man has the right to resist a patently unlawful arrest. It is further appellant's contention that if the Americans corrupted the Senegalese Government to violate its own laws, then no protest can be reasonably required. United States v. Marzano, 537 F.2d 257 (7th Cir., 1976); cf. Elkins v. United States, 364 U.S. 206 (1960); Wong Sun v. United States, 371 U.S. 471 (1963).

We urge this Court not to be blind to the realities of the situation at hand. Clearly this was an illegal abduction engineered by American agents, with the Senegalese Federal Police--especially this Chief, Sadibou Nadiaye--as their henchmen and agents to carry out the actual physical acts which culminated with Orsini being handed over to American agents on August 25, 1975 at Dakar airport. Surely, it is not within the language and spirit of Toscanino for this Court to wash its hands of a series of events which American agents set into motion, directed and reaped the benefits thereof by use of corrupted agents of another government to actually do their dirty work. The principles of due process deserve more than lip service; they

deserve a realistic application in a situation which is far from unique, but rather continues to be the modus operandi for the DEA.

CONCLUSION

FOR THE ABOVE STATED REASONS THE JUDGMENT MUST BE REVERSED AND THE INDICTMENT DISMISSED; IN THE ALTERNATIVE, THERE MUST BE A REMAND FOR A CONTINUANCE OF THE JURISDICTIONAL HEARING, WITH AN ORDER THAT THE SUBPOENA DUCES TECUM ISSUE.

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Respectfully Submitted,

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This brief and 10 copies thereof were served personally  
by me at the Office of the Clerk U.S. Court of Appeals, Foley Sq.,  
Rm 1705 on Feb. 23, 1977 at 9 am.

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